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Sports Concussion Claims: Are You Ready for an All-Out Blitz?

I. Different types of sports concussion claims

It is not just about football

When we think of sports concussion claims, inevitably we first think of football. Rarely a day goes by anymore without a story on ESPN involving a current or former NFL or college football player dealing with a recently-sustained concussion or the long-term effects of concussions. If you dismiss concussion claims as a problem for only the NFL and major college football programs, then you will be blindsided by the looming wave of claims. The plaintiffs' bar has already mobilized and is casting a wide net in pursuit of future claims.

Most professional sports leagues in the United States are currently involved in concussion litigation. This includes the NFL, NHL, MLS, and NASCAR. Concussion claims have crossed over from "real" sports to the world of sports entertainment. The WWE is involved in concussion litigation. Maybe those chair-shots aren't so fake after all?

Concussion claims are trickling down through all levels of amateur sports and include most sports. Hardly any sport is immune. Concussion claims now regularly pop up in baseball, wrestling, lacrosse, and even cheerleading.

Who are the targets?

The easier answer might be who is not a target. Concussion lawsuits target organizations such as athletic associations, leagues, and schools. Individuals are not escaping the crosshairs either. Potential defendants include coaches, doctors, athletic trainers, board members, and referees. On a broad level, there are two bases to these claims: not taking adequate measures to prevent concussions; and not taking adequate steps once an athlete suffers a concussion.

Concussion claims can also involve allegations of defectively designed or improperly maintained sports equipment. Product liability laws vary greatly by state, but regardless, it is not farfetched to imagine a scenario where your insured is sued in a claim where they didn't design or sell the equipment at issue.

Imagine this scenario:

> Billy suffers a concussion in a football game when he was 6 years old. His parents and their attorney suspect Billy's helmet is at least partially responsible for the concussion. Billy does not file his lawsuit until he is almost 20 years old. By then, the helmet manufacturer has gone out of business. Billy lives in a state where the seller of a product can be held liable as a manufacturer, if the actual manufacturer is out of business. Now take it one step further. Joe's Sporting Goods sold the helmet to Billy's football league, but Joe's has been sold and resold several times in the nearly 14 years from when Billy suffered his concussion until Billy's lawsuit was filed. Each time the buyer assumed the seller's liabilities, and no one was ever aware of Billy's concussion. What are the odds any records still exist for the sale of the helmet? What are the odds any records still exist for routine maintenance for the helmet? Gary's Gridiron Gear now faces a suit for a helmet they did not manufacture, design, or even sell.

There are parallels to what we may likely see in concussion litigation and what we have seen for decades in toxic tort litigation. When a claim involves a professional or college athlete, there is no problem finding a deep pocket to go after. At a lower level, there may not be a traditional deep pocket to go after, but there are plenty of smaller defendants to pursue. If the potential recoveries are bundled, then the ultimate recovery may be on par with what might have been recovered against a single deep pocket defendant.

Consider this scenario:

> Maria began playing organized sports when she was 5 years old, and competed in 4 sports per year, all the way through high school. She played for a combination of school, Select, AAU, CYO, and community recreation teams. During Maria's freshman year in college, she feels the effects of various concussions she may have sustained over the years. 13 years ago there was little to no concussion documentation kept in her various leagues. Maria's attorney casts a wide net and sues **every** coach (head and assistant; paid and volunteer); athletic trainer, team doctor; and league (the organization and the individual board members) for every sport Maria ever competed in. This amounts to 52 teams over 13 years. The number of defendants are exponential. Maria's attorney argues they are all better off paying $10,000 each to avoid the expense of litigation. You can do the math.

II. The ever-evolving standard of care and the current state of science

Standard of care remains in flux

What makes these cases tricky is that we are learning more and more about concussions every day – so the standard of care continues to evolve. In fact, since 2001, nineteen Position Statements have been published, including those by the NATA (the National Athletic Trainers Association) and the NCAA.

So, the experts have vastly competing views on what constitutes the proper standard of care. This can be illustrated by a case that I recently handled in which I represented a college, athletic trainer, and team doctor. One of the key issues in the case was whether preseason neuropsychological testing (such as IMPACT testing) was required to meet the standard of care. The plaintiffs retained one of the country's leading neuropsychologists, who took the view that the defendant's *not* conducting such testing was a "critical failure" on their part, and thus a breach of the standard of care. The defendants retained another leading neuropsychologist, who took the completely opposite view, expressing his opinion that there isn't sufficient reliability or utility of neuropsychological testing in this context, in part because of high false negative and positive rates – clearing players to play who should not be cleared and vice versa. So in that case, we had one neuropsychologist saying that neuropsychological testing is a must and another saying such testing does more harm than good.

But that's not the only area in which the experts have vastly competing views. There's still great debate on: what constitutes proper and adequate documentation of injuries; the extent to which athletic trainers and other healthcare providers should be communicating with their athletes, post-injury; as well as return-to-play protocol – another hotly debated topic to this day.

Current state of science –what's real/what's junk

On the science, there's further debate, such as on the issue of Second Impact Syndrome. This is the medical phenomenon that the brain sustains a first impact, and then another impact before the brain has had adequate time to heal and recover. (The initial injury is said to make the brain more vulnerable, and the "second impact" purportedly sets in motion catastrophic cerebral swelling. Death can occur within two to five minutes after the second impact.) That's the primary theory of causation in many of the concussion cases that I have handled.

The problem is, some say Second Impact Syndrome doesn't even exist. One leading neurologist and sports physician from Melbourne, Australia, has been studying SIS for almost two decades, but has yet to find verifiable scientific evidence to suggest that a repeated concussive injury is a risk factor for rapid and severe cerebral swelling. Yet these SIS cases are being filed all across the country.

And now there's a new wave of litigation – in the CTE context. Individual cases and class actions are being filed all across the country. The allegations are the same as in the SIS cases, e.g., failure to warn, and failure to educate. But the theory of causation is CTE.

Most physicians and researchers seem to think CTE exists. The question becomes what causes it? Many of the leading neuropathologists with whom I have spoken are only willing to go so far as saying that there MAY be a causal relationship between head trauma and CTE, but that no clear-cut cause/effect relationship has been established. One group in Boston recently reported CTE in 111 out of 112 brains of former NFL football players, but there was no control group; no brains of *non*-players were studied.

So we have a major lack of clarity on many of these issues – on the standard of care, as well as on the science. And what does that lead to? A great opportunity for plaintiff's lawyers to sue schools, and athletic trainers, and team doctors, and coaches whenever a bad outcome can in some way can be tied to a concussion. And that's precisely what's happening.

III. Current litigation trends

Types of suits

Concussion suits to date have been filed on behalf of individual plaintiffs as well as class actions. Class actions will likely continue to be popular for plaintiffs' attorneys, as it allows them to target many defendants, with a diluted burden of proof. Some suits have been limited in their scope to one defendant, while others cast a very wide net.

Consideration should be given to removing concussion lawsuits to federal court. Given the evolving science, coupled with the dissemination of junk science, federal courts are far more likely to strictly apply the *Daubert* standard and weed out unsupported claims.

Types of claims

At their core, concussion lawsuits are based upon one of two basic theories: a failure to take proper precautions to avoid a concussion from occurring; or, a failure to take proper precautions after an athlete sustains a concussion. Negligence is the cornerstone of most concussion lawsuits.

Many suits have product-based claims. The allegations may be product liability claims against designers or manufacturers of products. There may also be allegations that a school or a league did not provide proper or safe equipment to their athletes.

All states afford some level of immunity for their universities, school districts, and municipalities. These protections vary considerably from state to state. In some states immunity may serve as a complete bar to negligence claims. In other states, immunity statutes provide defenses which limit but do not totally bar recovery. Many states recognize an exception to immunity if recklessness or willful and wanton conduct is alleged.

A number of states recognize implied assumption of risk as a total bar to recovery on claims stemming from recreational activities, as opposed to an element of comparative fault. In those states, the only way around the bar to recovery is to allege recklessness.

Plaintiffs often allege fraud or concealment to avoid the statute of limitations. They allege the defendants either covered up or misled them about the risks of participation or the effect of injuries they suffered. Some courts have allowed suits to go forward for plaintiffs who had their concussions many years earlier, but allege their symptoms did not appear until much later.

IV. What the future holds

Increased public awareness

Public awareness of sports concussions and the potential for bringing claims is only going to increase as time goes on. Media coverage in both news and sports media continues to increase. The media coverage will not always be objective – a human interest story with a sympathetic subject will generate more buzz than a story focused on established scientific principles.

With the increase in media coverage, advertising by plaintiffs' attorneys will continue to increase. There are already television commercials for concussion claims. A number of firms have websites touting themselves as concussion experts.

Science and research continues to evolve. This will hopefully lead to safety innovations to improve protection for athletes. This will also hopefully improve our ability to better diagnose concussion-related conditions and their root cause.

Implementation of innovations for improved athlete safety (example): Safety in College Football Summit

The NCAA has recently hosted multiple Safety in College Football Summits, in an effort to improve and promote the health and safety of the athlete. The last such Summit, of which I was a participant, resulted in interassociation consensus recommendations for four paramount safety issues in collegiate athletics:

1. Independent medical care for college student-athletes;
2. Diagnosis and management of sport-related concussion;
3. Year-round football practice contact for college student-athletes; and
4. Preventing catastrophic injury in college student-athletes.

Even though we still don't have a crystal clear standard of care, having now spent over 12 years focusing on these cases, and in light of my work with the NCAA in particular, there are some pretty clear *minimum* "standards" to which individuals, such as athletic trainers, and entities, including schools, should adhere:

1. Schools have a concussion management plan on file;
2. Concussion evaluations be performed by a medical staff member – with concussion experience;
3. No same-day return to play;
4. Athletes be cleared by a physician;

5. Concussion education; and

6. Acknowledgments signed by students that they will report any injuries.

Football was the most controversial sport in America 120 years ago. It was actually banned for several years at the collegiate level until steps were taken to implement safety measures. Those reforms were literally the result of intervention by President Roosevelt. A number of organizations are looking at how to make football safer for their athletes. Both the Ivy League and Canadian Football League have eliminated full contact practices during the season. Changes have already been made to the rules for kickoffs to reduce high speed collisions. Other changes being considered include eliminating helmets and banning the three-point stance.

Changes are also being made in other sports. Many youth soccer leagues do not allow players younger than 11 to head the ball at all, and limit how many times player under 14 can head the ball.

Institutional developments

Improved record-keeping will be key to defending concussion claims. There is a wide range of normal in record-keeping practices. Sometimes items like rosters, waivers, incident reports, and enrollment forms are maintained meticulously for many years. Sometimes they are not. This documentation is key to proving where, when, and whether an athlete competed. Record retention policies need to be reviewed with organizations and institutions. Old "rules of thumb" about keeping records for 1, 2, or 5 years must be revisited, as it could be a decade or more after participation before a claim is made. This is particularly so if the athlete is a minor.

I remind my athletic trainer clients to keep in mind the adage, "If it's not documented, it didn't happen." If they don't, they'll wish they had done so either at an uncomfortable deposition years after the event in question and/or during an aggressive cross examination at trial where the examining attorney will attempt to discredit the witness who does not have complete and legible documentation in support of the witness' account of what transpired.

Documentation of what occurs in games and practices is another key. Many football teams are now cutting back on contact in practices – this should be documented. Many youth soccer leagues impose limitations on how often players may head the ball – this should be tracked. Years ago, coaches, parents, and administrators may have not thought to document instances where a player "had their bell rung" or suffered what was possibly a concussion. In such instances, no one may have thought medical intervention was necessary. As a result, whether or what happened is often an anecdotal exercise.

Improved proactive communication with medical professionals is another important next step. Obviously medical professionals need to be involved even if there is a mere suspicion of a concussion. Teams are now having baseline evaluations done for their players at the start of a season, and evaluations continue as a season progresses. This enables everyone to immediately recognize if there is a drop-off and take steps to determine why, as well as what must be done to protect the athlete. Sometimes an athlete can suffer a concussion without anyone immediately realizing it, and these measures may be the only way of discovering it.

Similarly, communication after a concussion ensures coaches and athletic trainers are better trained at recognizing the signs of a concussion, so timely measures can be taken to remove an athlete from competition and obtain proper medical attention.

I remind my athletic trainer clients, in particular, to communicate with recently-concussed athletes before, during, and after practices, and before, during, and after games, and – going back to the importance of documentation – to document each and every communication.

Keys to successful claim handling

Gathering the facts is key to any successful claim investigation. Knowing what facts to gather is often the difference between a successful and unsuccessful investigation. Sometimes your insured may be very familiar with the athlete making a claim. Perhaps there is a long history of participation together. On the other hand, perhaps the athlete only had marginal involvement with your insured. What do you need to find out?

You must gather a complete medical history for the athlete. The records of their primary care physician are an important first step, but by no means not the only step. You must obtain records for visits to emergency rooms and urgent care centers. If the athlete was hospitalized, had surgery, or saw a specialist for any reason, you must gather those records as well. These records will tell you if there is a prior history of concussions or other head trauma. They may also tell you if there was prior impaired cognitive functioning.

You must also gather school records. They will tell you about prior participation, and possibly prior injuries. The school records will include records for pre-season physical exams, and any baseline or subsequent neurological evaluations. The school records will also contain records of academic and testing performance, which will be important in evaluating a claim.

You must also collect records for non-school athletic participation. Until you know the full extent of an athlete's participation, you are limited in your ability to fully assess causation.

One of the keys in compiling such a history is talking to people who know the athlete – e.g. coaches, teammates, friends, boyfriends/girlfriends. They will be able to tell you where and when an athlete participated. They may also be aware of injuries which may not have occurred in a sanctioned practice or competition. A coach may not know what happened in a pickup game or unofficial workout, but others will.

Coverage issues

Some of the coverage issues presented by concussion claims will depend upon how wide a plaintiff casts their net. A suit could impact multiple policy periods with multiple insurers. If multiple policies are implicated, then the key questions include whether the jurisdiction takes an all sums approach and what rights and responsibilities a targeted insurer has.

One of the trickiest issues is what and when was the occurrence. This is a developing area of the law, and will likely vary depending upon the state. For example, look at a football lineman who takes several blows to the head each game. Is each blow a separate occurrence? Is the policy triggered by when the blow occurred or when the symptoms first appeared?

Some insurers are now adding specific exclusions to their policies for either head trauma claims or for claims stemming from athletic participation. Other potentially applicable exclusions include fraud and concealment, and intentional acts. There are several declaratory judgment actions pending between the NFL and their insurers. In the players' class action, fraud was one of the strongest allegations, and in turn it is one of the biggest points of contention in the coverage litigation.

The status of individual parties to a lawsuit present questions. Whether a plaintiff is an employee or an independent contractor may determine what remedies are available to them. Worker's Compensation may be an employee's sole remedy. There are ongoing efforts with the NLRB to recognize college athletes as employees.

Issues also arise if a coach or official is named. If a coach is employed by a school or organization, then there is likely coverage under their policy. Things are murky though in a rec league where the coach is a volunteer. They might not be covered under the league's insurance and have to look to their homeowner's policy.

Some of the issues raised by concussion claims are new. Other issues are similar to what has been litigated in the past. Now is the time to make sure you and your team have your playbook and game-plan together so you are ready for the blitz of claims.